APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-3796

HERMAN J. DOUCET,
Plaintiff-Appellee,

versus

DIAMOND M. DRILLING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Filed September 23, 1982

(Opinion August 23, 5 Cir., 1982, _____ F.2d ___).

(SEPTEMBER 22, 1982)

Before COLEMAN, POLITZ and GARWOOD, Circuit Judges

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing

En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL
RULE 17 FOR STAY OF THE
MANDATE

APPENDIX 2

[4302]

DOUCET v. DIAMOND M. DRILLING CO.

Herman J. DOUCET, Plaintiff-Appellee,
v.
DIAMOND M DRILLING COMPANY,
Defendant-Appellant.

No. 80-3796

United States Court of Appeals,
Fifth Circuit.

Aug. 23, 1982.

Pusher for independent oil well casing operator sued owner of submersible offshore drilling barge to recover for back injuries sustained while attempting to remove metal protector from pipe threads. The United States District Court for the Western District of Louisiana, W. Eugene Davis, J., rendered judgment for the pusher, and owner appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) pusher failed to show that owner was negligent in failing to replace metal protector with a rubber one, and (2) pusher failed to show that owner's employee heard and failed to comply with pusher's request to raise the casing pipe a little higher to an arguably more safe position.

Reversed.

1. Federal Civil Procedure key 2126, 2608

On motions for directed verdict and for judgment notwithstanding the verdict the court considers all of the evidence, not just the evidence which supports the nonmover's case, but in the light and with all reasonable inferences most favorable to the party opposed to the motion.

2. Federal Civil Procedure key 2144, 2608

If facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of a motion for directed verdict or for judgment n. o. v. is proper but if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair minded men in exercise of impartial judgment might reach different conclusions, the motion should be denied.

3. Federal Civil Procedure key 2146, 2608

A mere scintilla of evidence is insufficient to present a jury question and insufficient to defeat a motion for directed verdict or for judgment n. o. v.

4. Federal Civil Procedure key 2151, 2608

Motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict, and there must be a conflict in substantial evidence to create a jury question.

5. Federal Civil Procedure key 2148, 2608

It is the function of the jury as the traditional finder of facts, and not the courts, in ruling on a motion for directed verdict or judgment n. o. v., to weigh conflicting evidence and inferences and determine credibility of witnesses.

6. Shipping key 84(1)

Where both the vessel and a longshoreman employed by an independent contractor work concurrently on the same operation, the vessel is liable if it negligently injures the longshoreman or fails to exercise reasonable care under the circumstances to avoid exposing him to harm from hazards he might encounter from causes under the active control of the vessel. Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A. §905(b).

7. Shipping key 84(5)

Defense of assumption of risk was unavailable to owner of submersible oil drilling barge as regards claims of pusher for independent oil well casing company to recover for back injuries sustained aboard the barge. Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A. §905(b).

8. Shipping key 84(2)

Failure of roustabout employed by owner of submersible oil well drilling barge to remove metal protector from pipe threads did not give rise to liability on part of owner for back injury sustained by pusher for independent casing operator in removing the protector absent evidence that sending pipe to drilling floor with the protector was unusual or represented a foreseeable hazard to the experienced pusher. Longshoremen's and Harbor Workers' Compensa-

tion Act, §5(b), 33 U.S.C.A. §905(b).

9. Shipping key 86(2¾)

Independent casing operator crew pusher who was injured on board of submersible drilling barge, had burden of establishing actionable negligence on part of the vessel by a preponderance of evidence under the *Scindia* standard, which governs vessel liability, and that burden could not be met through self-contradictory testimony of a single expert witness, especially where that testimony was outweighed by the other uncontradicted evidence. Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A. §905(b).

10. Shipping key 84(2)

Operation in a manner similar to that used by others is relevant but not conclusive as to a vessel's negligence and liability to a longshoreman as ultimate issue is whether the vessel negligently used a procedure which it knew, or in exercise of due care should have known, was unsafe. Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A. §905(b).

11. Shipping key 86(2¾)

Independent well casing operator's pusher, seeking to recover from owner of submersible drilling barge for back injuries sustained while attempting to remove metal protector from pipe thread, failed to establish that owner's driller in charge of pipe lift heard but failed to heed pusher's request to raise a pipe, which pusher believed was too low to permit safe removal of thread protector, a little higher to an arguably more safe position. Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A. §905(b).

Appeal from the United States District Court for the Western District of Louisiana.

Before COLEMAN, POLITZ and GARWOOD, Circuit Judges.

COLEMAN, Circuit Judge.

Herman J. Doucet injured his back while working as a pusher for an oil well casing crew on a submersible drilling barge in the Gulf of Mexico, twenty miles off the Louisiana shore. Upon suit brought under 33 U.S.C., §905(b), 1/ a jury in the Western District of Louisiana absolved Chevron U.S.A., Inc. of negligence and found that Diamond M Drilling Company was guilty of negligence proximately causing

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1/ The statute in question, §905(b), provides:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof may bring an action against such vessel as a third party in accordance with the provisions of §933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Doucet's injuries. His damages were assessed at $600,000, reduced by ten percent for his contributory fault. Judgment was entered for $540,000 less $65,213.64 awarded American Home Assurance Company as the intervening Diamond M compensation carrier. Diamond M appeals. We reverse.

As operator, Chevron U.S.A., Inc., contracted with Diamond M for the drilling of the oil well, off the coast of Louisiana. Diamond M supplied the submersible drilling barge EPOCH, the drilling crews, and the roustabout crews. Chevron contracted with Offshore Casing Crews, Inc., Doucet's employer, for the oil well casing operations which were to be prosecuted on board the vessel.

April 21, 1977, aboard the EPOCH, Doucet was the foreman (pusher) of the five man casing crew employed by and working for Offshore, executing the casing contract for Chevron. The casing crew was working in conjunction with the roustabouts employed by the vessel. Doucet had five years experience as a pusher, and had worked on many similar jobs, which usually ran five to ten to twenty-four hours, depending upon weather and other conditions.

Beginning at approximately 11:30 P. M., the casing crew spent an hour and a half getting the casing equipment ready to go. A trolley line was rigged from the drill floor to the pipe rack. At Chevron's direction, Doucet's crew had brought five rubber thread protectors aboard the EPOCH. They were to replace the metal thread protectors originally attached to the end of each pipe joint to protect the threads from damage while being moved about from place to place. The casing crew showed the Diamond M roustabouts how to replace the metal protectors with the rubber ones before sending the pipe along to the platform. As a matter of fact, the casing crew removed the first five metal protectors and put

on the rubber ones while the joints lay on the pipe rack. The casing crew then returned to the rig floor and began operations.

When the pipe is taken from the pipe rack and arrives at the point where it is to be set in the drilling hole the rubber protector is unsnapped and sent back down the trolley to be used on the succeeding joints.

In six to seven years work in casing operations, Doucet was experienced in taking off both metal and rubber pipe thread protectors and had worked with metal protectors on approximately half of the jobs he had been on. The casing pipe joints were hoisted from the pipe rack onto the drilling floor by the draw works which were operated by the driller, a Diamond M employee. Doucet would unsnap the rubber protectors from the joints and guide the joints into the drill hole. After running about an hour of casing (twenty to twenty-five lengths), Doucet noticed that a drilling floor worker was unable to remove a metal protector. Intending to remove the metal protector, Doucet picked up a 36 inch pipe wrench and placed it around the protector. Upon applying the wrench Doucet says he realized that the pipe was hanging too low, that is, about 2½ feet off the drilling floor (Doucet was only 5½ feet tall) so he "hollered to" the driller, a Diamond M employee, to "raise the joint a little". Hand signals are often used in such a situation but Doucet was holding the wrench with both hands and in that position could not give a hand signal. The driller was somewhere between ten and twenty feet away. At trial, the driller did not recall the incident, but testified that such a verbal request if given and heard would have been complied with as a matter of course. For whatever reason, the joint remained below waist level and Doucet did not repeat his request,

he did not wait on a lift, and there is no evidence that he asked for the assistance of a welder to cut off the metal protector with a blow torch. Instead, he energetically jerked on the metal protector six or seven times and then felt a hard pain in his back. This took place around 2 A. M. on April 22, 1977, and that is what this litigation is about.

After the incident, Doucet quit working because of the pain in his back but remained aboard the EPOCH until the job was completed. For eight or ten days afterward he did not go to a doctor. He had had two back injuries prior to this one. Fourteen years previously he had fractured three vertebrae and was unable to work for six weeks. The second injury occurred about 1975 when Doucet pulled a muscle in his back and missed three to four weeks of work. Doctors were of the opinion that because of his back condition Doucet could not permanently return to heavy manual work, such as that of a longshoreman or roughneck. His fourth grade education substantially restricted his possibilities of finding sedentary work. An expert testified that the injuries caused a loss of $561,385.80 in future wages and this testimony was not contradicted.

At trial, Doucet asserted that Diamond M was negligent in that it had failed to replace the metal protector with a rubber one, and in failing to raise the casing pipe "a little higher" when requested to do so.

Diamond M claims that *as a matter of law* the evidence was insufficient to generate a factual issue regarding its alleged negligence; therefore, the District Court erred in not granting its motions for directed verdict, for judgment notwithstanding the verdict, or for a new trial. Alternatively, it is said that the trial judge abused his discretion in fail-

ing to order a remittitur or a new trial on the issue of damages. Diamond M argues that it owed no legal duty to Doucet to remove the protector or to raise it, and if such a duty did exist any breach thereof was not the legal cause of Doucet's injury. Finally, it argues that Doucet's disregard for his own safety was the sole legal cause of his injury.

[1-5] As to activity on a submersible barge oil drilling rig in the Gulf of Mexico, this case is very similar to that decided by this Court in *McCormack v. Noble Drilling Corporation*, 608 F.2d 169 (5th Cir. 1979). There, the standard of review for the sufficiency of the evidence in such cases was announced as "firmly established", to-wit, that of *Boeing Company v. Shipman*, 411 F.2d 365, 374, 375 (5th Cir., 1969) (en banc).[2]

2/ On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence - not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses (Footnote omitted).

I

[6, 7] This is a case in which both the vessel and the longshoremen employed by the independent contractor, Offshore, were working concurrently on the same operation. In these circumstances the vessel would be liable if it negligently injured the longshoreman or if it failed to exercise reasonable care under the circumstances to avoid exposing him to harm from hazards he might encounter from causes under the active control of the vessel, *Scindia Steam Navigation Company, Ltd. v. De Los Santos*, 451 U.S. 156, 167, 101 S. Ct. 1614, 1622, 68 L.Ed.2d 1 (1981). *Scindia* says that "Congress intended to make the vessel answerable for its own negligence", 101 S. Ct. at 1622. 3/ We think *Scindia* means that in the case now before us the decisive issue is whether the evidence could justify a finding by a reasonably minded jury that Diamond M negligently exposed Doucet to a hazard which it knew, or in the exercise of reasonable care under the circumstances should have known, would proximately cause his injury.

II

We have analyzed and reanalyzed the record in this case to see whether Doucet offered enough evidence to meet the *Scindia* test. Our task has not been made any easier by the fact that Diamond M was so confident of its position that it offered no testimony of its own. Even so, we find ourselves unable to avoid the firm conviction under *Boeing* standards that Doucet must lose this appeal.

3/ The defense of assumption of risk is unavailable in §905(b) litigation. Diamond M may not defend on the ground that Doucet should have refused to proceed until the rubber protector had been installed. *Scindia*, 101 S. Ct. at 1626, note 22.

We first consider the failure of the Diamond M roustabouts to remove the metal protector from the length of pipe on which Doucet hurt himself and their corresponding failure to install the rubber protector before sending the pipe to the drilling floor.

The evidence is clear that Chevron had directed that the metal protectors be replaced with the rubber protectors, had furnished them for that purpose, and Doucet had brought them aboard. As a general proposition, it is clear that the Diamond M crew had agreed to use them but there was no testimony from anybody on the drilling platform, from Doucet or anybody else, that it had been understood that the roustabouts would remove stuck or "tight" metal protectors before sending them up. Many forty foot sections of 13 3/8 inch pipe had previously come up with the rubber protectors and had been installed without complication. From Doucet's testimony it appears that there had been between twenty and twenty-five of these sections. There was testimony from at least two of Doucet's witnesses that the metal protectors had been cross threaded. None of the litigants called any of the roustabouts as witnesses in search of an explanation for sending up this section of pipe without the metal protector. We think the jury could reasonably infer from the evidence that the roustabouts found it either difficult or impossible to remove the metal protector, so they simply sent it to the drilling floor where the casing crew would have to deal with it, but neither the pipe section nor the metal thread protector injured Doucet. The pipe did not fall on him or strike him. He hurt himself while attempting to remove the metal protector.

Therefore, the decisive issue becomes: Did the evidence in a manner that could have been accepted by a reasonably

minded jury show by a preponderance of the evidence that the Diamond M roustabouts negligently exposed Doucet to a hazard which they knew, or in the exercise of "reasonable care under the circumstances" should have known, would put him to the hazard of personal injury?

Doucet had only a fourth grade education but upon reading his testimony one is impressed by his ability to respond to questions clearly, logically, and succinctly. Doucet did not say that sending the pipe up with a metal thread protector was unsafe or that it presented him with an unusual or an unexpected hazard. He complained only that he got hurt because the driller had not raised it a little higher when asked to do so. Doucet testified (Tr. 260) that he had previously used Stillson wrenches to loosen stuck metal protectors, that it was not an uncommon practice, that over half the jobs on which he had worked used metal protectors. He said that sometimes the metal protectors can be taken off by hand, sometimes with a wrench, and sometimes they had to be burned off by a welder, that burning them off was not unusual.

At page 263 of the transcript we find the following:

> Q. Was there any way that you could tell whether or not that steel protector would come off easily with the pipe wrench until you pulled on it?
>
> A. (By Mr. Doucet) No, no, that happened many times where we had to put the wrench on. Sometimes they come off easy with the wrench, sometimes you got trouble.

[8] We conclude that there was no evidence, directly or by inference, that sending the pipe up with the metal protector was unusual or presented a foreseeable hazard of personal injury to an experienced casing crew pusher, as Mr. Doucet undoubtedly was.

On the other hand, there was much testimony from many sources (all of it adduced on behalf of Mr. Doucet) that the chief function of the rubber thread protector is to expedite the casing work; that the protectors are not used to improve the safety of the operation; and in 25% of the cases metal protectors will have to be *cut off* before using the pipe.

However, Doucet presented the testimony of Paul Montgomery, a petroleum engineer, testifying as an expert, who said that 60% of his current income came from supplying expect testimony in court for parties plaintiff and defendant. He had never seen or inspected the Diamond M drilling rig.

At page 327 of the transcript he testified that he liked "to use quickie (rubber) protectors[']*not from a safety consideration, but for other considerations'* (emphasis added).

Mr. Montgomery was then asked to state the reasons for using the rubber protectors. He responded (Tr. 328):

A. First off, I would like to take the metal protectors off the pipe while its on the racks and it gives you an opportunity to look at the threads and possibly eliminate a problem that you might have later on while you are actually running the casing. Also, if necessary, you can clean the threads then put the metal protectors back on just hand tight and since you only have a limited supply of quickie

protectors, you put them on just before you take the pipe up onto the rig floor to be run. It saves a great deal of time for the casing crew and speeds up the operation in my experience to use quickie protectors.

At page 336, we see the following testimony from Mr. Montgomery:

Q. Have you ever had any experience where rubber protectors had been ordered and were present on the job when they weren't used and the metal protectors were used instead?

A. I have had occasions where we had rubber protectors and we were using them where a joint occasionally would come up on the floor with the steel protectors still on it because it was cross threaded, because they had not been able to get it off on the pipe rack, but that is the exception rather than the rule. rule.

Q. And in those cases, how would you normally take if off?

A. Start with a sledge hammer, if it's cross threaded and try to get it back even or level if at all possible and the next thing that I would think about doing would be to weld a lug, a nut or something of the sort on the side of the protector and using the hammer some more. Generally, that will get it off short of cutting the protector.

Finally, (Tr. 337) Mr. Montgomery testified:

Q. In this particular case, do you have an opinion as to whether the failure to remove the metal protector on the pipe rack and to replace it with a rubber protector made that casing operation unsafe at that time?

A. Yes, I think it should have been removed on the pipe rack.

This one answer is the sole and only evidence in this record upon which a jury could rely in finding, if it did so find, that sending up the pipe with the metal protector amounted to actionable negligence. Yet, Mr. Montgomery stated at the very beginning of his testimony that the use of rubber protectors was NOT FOR SAFETY REASONS but for other reasons.

[9, 10] Mr. Doucet had the burden of establishing actionable negligence by a preponderance of the evidence under *Scindia* standards and that burden simply could not be met by the self contradictory testimony of a single witness, especially when that statement is balanced against all the other uncontradicted evidence in this record 4/ and heretofore set forth in this opinion. This is most cogently so because Mr. Doucet testified (Tr. 196) as follows:

Q. What is the purpose of these rubber protectors? What good do they do you on the job?

4/ **The Court is aware of the rule that operations in a manner similar to that used by other companies is relevant but not conclusive as to a defendant's negligence, *McCormack v. Noble Drilling Corporation*, 608 F.2d 169 (5th Cir., 1979). The ultimate issue is whether the defendant negligently used a procedure which it knew, or in the exercise of due care should have known, was unsafe.**

A. Try to protect the threads on the joint and faster - makes it a faster job.

III

[11] This means, of course, that Mr. Doucet's recovery must stand or fall on that theory of the case which he developed in his own testimony, which may fairly be stated, as follows: Diamond M's driller in charge of the pipe lift saw that Doucet was trying to remove a metal thread protector and when requested to lift the pipe a little higher (to an arguably more safe position) he neglected to do so, thus contributing to the injuries to the crew leader's back.

We begin our analysis of this aspect of the case by looking first to Mr. Doucet's testimony.

Q. When that joint came up with the metal protector on, did you ask the driller to do anything?

A. While I was taking it off?

Q. Yes, sir.

A. While I was jerking on it?

Q. Yes, sir.

A. Yeah, I asked him to pick it up a little.

Q. Did he do it?

A. No.

(Tr. 201).

At a later point, (Tr. 202):

"I went and got me a 36 inch pipe wrench and I put it on and I - when I first put it on I realized that my pipe was too low so I looked at the driller and I hollered at him - I couldn't make any signs with my hands - both my hands were tied up and I hollered at him to pick up a little and he didn't so I started jerking on it."

At a later point, (Tr. 238):

Q. Now, when you told him that, was Mr. Buchan (the driller) looking at you?

A. Yes, sir.

Q. What did he do?

A. Nothing.

Q. Did he say anything back to you?

A. No.

Q. When Mr. Buchan didn't respond to that "pick up the pipe a little", you then went on ahead and pulled on it anyhow, sir?

A. Jerked on it, yeah.

The members of Mr. Doucet's crew were Terry Meche, Emery Richard, Dale Briscoe, and Glenn Bourgeois.

Terry Meche saw the episode from forty five feet up in the tower. Introduced as a witness for the plaintiff he said

nothing about hearing Doucet "holler" at Buchan, the driller, so it must be assumed that the "holler" could not be heard at a distance of forty five feet. He said Buchan was situated between twenty and twenty five feet from where Doucet was using the wrench. Did Buchan hear the holler, or should he have heard it if he had been paying attention to his business? We must assume that he was paying attention because Doucet testified that Buchan was looking at him at the time.

When Buchan was put on the witness stand he had no memory of the incident, so he could shed no light on it whatever.

Emery Richard testified that he was a floor hand on Doucet's crew, operating the tongs. He was standing on a platform five or six feet high located five or six feet from Doucet, between Doucet and the driller and the driller was on the floor only five or six feet from Richard. Richard said he heard Doucet ask the driller "to kind of pick up a little higher". He never saw Doucet use hand signals at any time but Doucet testified that he used hand signals at all times when he did not have his hands on the wrench.

Dale Briscoe worked the V-door. He said he saw the injury take place but also said that it took place in the daytime, the sun was out, whereas Doucet and Richard testified that it took place at 2 A. M. He was eight feet from Doucet. He gave no testimony concerning Mr. Doucet hollering to Buchan to raise the pipe.

Glenn Bourgeois was called as a witness by Doucet. He was on a stand three feet high, handling the mud and joining the pipes. He said that rubber protectors were used because they made the job go faster and smoother. He was not

looking at Doucet when he got hurt. He thought Doucet was not over ten feet from the driller. He said the injury occurred *in the morning, before lunch.* He said Doucet gave a hand signal for Buchan to raise the pipe. Then (Tr. 155) Bourgeois said that the casing crew used hand signals most of the time "because a rig is very noisy, you have to scream to the top of your head to make him understand you".

In this mass of inconsistent, sometimes contradictory, testimony, all adduced by Doucet in support of his claim, could a reasonably minded jury have found by a preponderance of the evidence that the driller, Buchan *heard* and *ignored* the "hollered" request to raise the pipe a little higher?

Boeing teaches that on motions for a directed verdict all of the evidence must be considered along with all reasonable inferences most favorable to Doucet. If the facts and inferences point so strongly and overwhelmingly in favor of a particular party that reasonable jurors could not arrive at a contrary verdict the motion may properly be granted. If there was substantial evidence in support of Doucet, such as that might cause reasonable jurors to differ about it, the verdict must be left undisturbed. However, a mere scintilla of evidence is insufficient to present a question for the jury.

The jury had a right to believe Doucet's testimony that he "hollered" at Buchan to raise the pipe. He said Buchan was looking at him, but he took no action. Buchan could have heard Doucet. Did he, in fact, do so? A close examination of the record shows that on this issue the jury was left to rely on speculation and conjecture. His witness said that a drill rig is so noisy that you have to scream at the top of your head to be heard. Inferentially, Doucet concedes

this because he said he "hollered". Richard, stationed five or six feet horizontally and the same distance vertically from Doucet says he heard the "holler" but he was stationed between Doucet and the driller. Two other witnesses, Doucet's witnesses, as close to Doucet as Emery Richard, said nothing about hearing the "holler". Indeed, one of them went so far as to say that he never saw anything but hand signals on this particular job on board the EPOCH and Doucet testified himself that he had used hand signals when not holding the wrench.

Could reasonable jurors differ over whether substantial evidence supported an inference that the driller had heard the "shouted" request and simply failed to honor it?

On this issue, we are left with an abiding conviction that they could not. Therefore, the directed verdict on behalf of Diamond M should have been granted.

The judgment of the District Court is

REVERSED.

APPENDIX 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

HERMAN J. DOUCET

VS. CIVIL ACTION NO. 780431

DIAMOND M DRILLING COMPANY ET AL

MINUTE ENTRY

September 16, 1980

The motions filed by Diamond M Drilling Company for directed verdict, judgment n. o. v., remittur and new trial are hereby denied.

Lafayette, Louisiana, this 15th day of September, 1980.

/s/ W. Eugene Davis
Judge, United States District Court

APPENDIX 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
CIVIL ACTION NO. 780431

HERMAN J. DOUCET

VERSUS

DIAMOND M DRILLING COMPANY ET AL

JUDGMENT

FILED JULY 3, 1980

This action came on for trial before the Court and Jury, the Honorable W. Eugene Davis, District Judge, presiding, the issues having been duly tried, the Court having instructed the jury to make answer to certain special interrogatories, and the jury having duly rendered a verdict and having made answer to said special interrogatories as follows:

We, the jury in the above entitled action, find from a preponderance of the evidence as follows:

INTERROGATORY NO. 1: Was defendant Diamond M Drilling Company guilty of negligence which was a proximate cause of Herman J. Doucet's injuries?

ANSWER "YES" OR "NO"

ANSWER Yes

INTERROGATORY NO. 2: Was defendant Chevron U.S.A., Inc., guilty of negligence which was a proximate cause of Herman J. Doucet's injuries?

ANSWER "YES" OR "NO"

ANSWER No

If your answers to both of the above interrogatories were "no," proceed no further. Have you foreperson sign the verdict in the space provided below and report to the Marshal in order to return these answers into court.

If your answer to either of the above interrogatories was "yes," proceed to Interrogatory No. 3.

INTERROGATORY NO. 3: a) Was plaintiff, Herman J. Doucet, guilty of negligence which was a proximate cause of his injury?

ANSWER "YES" OR "NO"

ANSWER Yes

b) If your answer to Interrogatory No. 3(a) was "yes," to what extent was the negligence of plaintiff responsible for the accident? Answer by means of a numerical percentage from 0% to 100%;

ANSWER 10%

INTERROGATORY NO. 4: What amount, if any, do you find will adequately compensate the plaintiff, Herman J. Doucet, for the damages sustained by him as a result of his injury, WITHOUT ANY REDUCTION FOR ANY PERCENTAGE OF CONTRIBUTORY NEGLIGENCE WHICH

YOU MAY HAVE FOUND ON HIS PART? Answer by means of a numerical figure.

ANSWER $600,000

IT IS ORDERED AND ADJUDGED that intervenor, American Home Assurance Company recover from defendant, Diamond M Drilling Company the sum of SIXTY-FIVE THOUSAND TWO HUNDRED THIRTEEN AND 64/100 ($65,213.64) DOLLARS, together with legal interest from date of judgment until paid, and its costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff, Herman J. Doucet recover from defendant, Diamond M Drilling Company the sum of FOUR HUNDRED SEVENTY-FOUR THOUSAND SEVEN HUNDRED EIGHTY-SIX AND 36/100 ($474,786.36) DOLLARS, together with legal interest from date of judgment until paid, and his costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that the suit of plaintiff, Herman J. Doucet, against defendant, Chevron U.S.A. Inc., be and the same is hereby dismissed, with prejudice, at plaintiff's costs.

The Court expressly determines under Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay and enters final judgment herein.

Thus Done and Signed at Lafayette, Louisiana, this 2nd day of July, 1980.

ROBERT H. SHEMWELL, CLERK
By: /s/ Illegible
Deputy Clerk

APPROVED AS TO FORM:
/s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES DISTRICT JUDGE

APPENDIX 5

33 U. S. C. §905(b):

"(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

APPENDIX 6

COMPILATION OF PRE-SCINDIA FIFTH CIRCUIT DECISIONS IN SECTION 905(b) CASES

CASE 1.

Slaughter v. S. S. Ronde Fyffes Group, Ltd., 509 F.2d 973 (5th Cir. 1975)

FACT SUMMARY

Ship listing-longshoreman injured while attempting to load roll of liner board. Gratings in hold alleged to be defective.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: held no negligence by ship.

FIFTH CIRCUIT DECISION

Affirmed (Wisdom, Bell and Clark, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 2.

Parker v. South Louisiana Contractors, Inc., 537 F.2d 113 (5th Cir. 1976)

FACT SUMMARY

Truck driver delivering load of casing to be loaded onto

barges in the Atchafalaya River to be used in oil exploration activities over water was injured when he slipped in unlighted gap in loading ramp running between dock and barge. Jurisdiction urged: §905(b), Admiralty Extension Act, 46 U.S.C. 740, and 33 U. S. C. §903(a) granting compensation for injuries on "any adjoining pier, . . . or other adjoining area customarily used by an employer in loading, unloading . . . a vessel."

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: granted defendant's motion for summary judgment dismissing case on ground no maritime jurisdiction.

FIFTH CIRCUIT DECISION

Affirmed

(Tuttle, Ainsworth and Clark, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 3.

Smith v. M/V Captain Fred, 546 F.2d 119 (5th Cir. 1977)

FACT SUMMARY

Ship repairman sued vessel on which he was injured for its negligence as a third party under §905(b) even though owner of the vessel was also repairman's employer.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: granted motion to dismiss because repairman could not sue vessel owner because exclusive remedy against employer was compensation.

FIFTH CIRCUIT DECISION

Reversed and remanded for trial. Under *Reed v. The Yaka*, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448 (1963) repairman could sue employer-shipowner for §905(b) negligence. (Coleman, Clark and Tjoflat, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 4.

Gay v. Ocean Transport & Trading, Ltd. and Guerra v. Bulk Transport Corp., 546 F.2d 1233 (5th Cir. 1977)

FACT SUMMARY

Cases of Two *longshoremen consolidated:*
(1) *Gay*: Air blower did not remove carbon monoxide fumes from propane forklift from unventilated reefer compartment, poisoning plaintiff.
(2) *Guerra:* Ship's boom knocked pallet from deck into hatch onto plaintiff.

TRIAL COURT DECISION:
(JURY OR JUDGE)

(1) Judge: summary judgment for vessel.

(2) Judge: *held* no negligence by ship.

FIFTH CIRCUIT DECISION

(1) Affirmed
(2) Affirmed

(Coleman, Clark and Tjoflat, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

(1) NO
(2) NO

CASE 5.

Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977) (Summary Calendar)

FACT SUMMARY

Large rack fell off stevedore's forklift onto operator in hold cleaning operations plaintiff alleges ship knew of longshoring health and safety violations.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: summary judgment for vessel.

FIFTH CIRCUIT DECISION

Affirmed No duty owed by ship to Brown, as a matter of law, "even if the ship's crew was aware of the danger posed by the unstable rack." 550 F.2d at 335.

(Wisdom, Thornberry & Tjoflat, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 6.

Bossard v. Exxon, 559 F.2d 1040 (5th Cir. 1977)

FACT SUMMARY

Barge cleaner asphyxiated while working inside large tank. Plaintiff claimed violations.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: granted Motion to Dismiss in nature of Summary Judgment.

FIFTH CIRCUIT DECISION

Affirmed
(Per Curiam: Gewin, Roney and Hill, Circuit Judges) Danger was open and obvious to deceased. Safety & health regulations for longshoremen impose duties on stevedore, not on shipowner.

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 7.

Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977)

FACT SUMMARY

Employee of contractor hired to "free" barge of gasoline severely burned in explosion. Plaintiff alleged negligence in failure to provide safe place to work and to take extra precaution with ultrahazardous activity.

TRIAL COURT DECISION: (JURY OF JUDGE)

Judge: Directed verdict for defendant at close of plaintiff's evidence

FIFTH CIRCUIT DECISION

Affirmed

(Gervin, Roney and Hill, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 8.

Briley v. Charente Steamship Company, Ltd., 572 F.2d 498 (5th Cir. 1978) (Summary Calendar)

FACT SUMMARY

Longshoreman standing upon boxes of cargo *loaded at previous port* to reach shackle hook. Boxes were jumbled in a pile and plaintiff fell into space between cargo w. n his foot became tangled in a net not supplied by vessel. Plaintiff claimed vessel was negligent because it knew of hazardous condition and failed to correct it.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Summary Judgment for defendant shipowner.

FIFTH CIRCUIT DECISION

Affirmed:
(Per Curiam: Roney, Gee and Fay, Circuit Judges).

"The jumbled condition of the boxes was observed by plaintiff. It was within his power to correct." 572 F.2d at 500.

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 9.

Samuels v. Empresa Lineas Martimas Argentinas, 573 F.2d 884 (5th Cir. 1978)

FACT SUMMARY

Longshoreman unloading steel beams at night. Plaintiff

stepped backward into hole in unlit area.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Jury: Verdict for Plaintiff

FIFTH CIRCUIT DECISION

Affirmed:

(Skelton, Fay and Rubin, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

YES

CASE 10.

Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338 (5th Cir. 1978)

FACT SUMMARY

Longshoreman injured while working aboard ship. No other facts stated.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Decision for defendant prior to 5th Circuit's enunciation of §343A Restatement test in *Gay*

FIFTH CIRCUIT DECISION

Reversed and Remanded to apply §343A test, saying: "Our remand implies no opinion that a new trial . . . is necessary."

(Wisdom, Goldberg & Rubin, Circuit Judges, Per Curiam)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 11.

Stockstill v. Gypsum Corporation, 607 F.2d 1112 (5th Cir. 1979)

FACT SUMMARY

Ship repairer's welder employee fell from ladder descending into forepeak tank. Plaintiff shoved oil and grease on deck and ladder.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Directed verdict for Defendant.

FIFTH CIRCUIT DECISION

Affirmed

(Gervin, Ainsworth, Reavley, Circuit Judges) (Judge Reavley dissenting).

Majority: "the danger of the grease [was] open and obvious to Stockstill." 607 F.2d at 1117.

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 12.

McCormack v. Noble Drilling Corp., 608 F.2d 169 (5th Cir. 1979)

FACT SUMMARY

Noble drilling well for Chevron. Plaintiff was casing crew member tong operator. He was injured when tubing being lowered into well bent when power tongs applied causing tongs to spin around and pin him. Plaintiff alleged top of pipe should have been secured by rig elevators instead of only held by hand.

TRIAL COURT DECISION: (JURY OR JUDGE)

Jury: (1) Drilling contractor, Noble, negligent. (2) Well owner, Chevron, held negligent. (3) Plaintiff 20% negligent. Award of $376,000.

FIFTH CIRCUIT DECISION

(1) Affirmed as to Noble: who had "intimate involvement in the casing operation" (2) Reversed as to Chevron: No

participation in casing process.
NOTE: NO MENTION OF §905(b) STANDARD BY EITHER COURT. CASE TREATED AS ORDINARY TORT CASE

(Simpson, Charles Clark, and Frank Johnson, Jr., Circuit Judges).

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

YES

CASE 13.

Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980)

FACT SUMMARY

Oil drilling roughneck injured aboard tender anchored adjacent to fixed drilling platform when he slipped while stowing anchor chains.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: Summary judgment for defendant - Plaintiff not seaman and no right to sue shipowner for negligence under §905(b).

FIFTH CIRCUIT DECISION

Affirmed
Summary Judgment on Seaman Status.
Reversed and *Remanded* for trial of §905(b) claim.

(Tuttle, Goldberg and Randall, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 14.

Hess v. Port Allen Marine, 624 F.2d 673 (5th Cir. 1980) (Summary calendar)

FACT SUMMARY

Employee same as in Case #7 above. Here suing owner of "gas freeing" facility alleging that it was owner *pro hac vice* of barge it had taken into custody to gas free and therefore, subject to suit for negligence under §905(b).

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Summary Judgment for defendant-relationship with vessel not sufficient to be owner pro hac vice.

FIFTH CIRCUIT DECISION

Affirmed:

(Brown, Tjoflat, and Frank M. Johnson, Jr., Circuit Judges)

(Per Curiam)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 15.

Hebron v. Union Oil of California, 634 F.2d 245 (5th Cir. 1981)

FACT SUMMARY

Painter employed to paint oil's platforms was ordered by Union Oil foreman to go aboard vessel to load an A-frame. While plaintiff was disengaging crane line from A-frame on board vessel, crane hook accidentally latched onto A-frame throwing plaintiff to deck ten feet below. Union Oil sued as owner *pro hac vice* of vessel under §905(b).

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: Directed verdict for defendant and involuntary dismissal. No negligence.

FIFTH CIRCUIT DECISION

Affirmed.

(Ainsworth, Garza and Sam Johnson, Circuit Judges) (Per Curiam)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 16.

Mallard v. Aluminum Company of Canada, Ltd., 634 F.2d 236 (5th Cir. 1981)

FACT SUMMARY

Newsprint stacked 3 tiers high with plywood walking boards crisscrossed on top. Forklifts ran on plywood. Charterer provided boards. Plaintiffs alleged had warned shipowner tighter stow needed to avoid voids beneath boards. Boards cracked under wheel which slipped into void toppling forklift over on plaintiff, *paralyzing* him from chest down. Void was 1 ½ feet by 2 feet as opposed to normal 6 inches.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: (1) Dismissed Canadian Stevedore for lack of jurisdiction.
(2) Summary Judgment for vessel, its owner & charterer on grounds no negligence as a matter of law.

FIFTH CIRCUIT DECISION

(1) Affirmed
(2) Reversed and Remanded: Court must find whether plywood boards were obviously or latently defective to determine standard of negligence. If boards obviously hazardous, owner charterer might be absolved if "Mallard was in a better position to appreciate fully the hazard and avoid the danger." 634 F.2d at 245.

(Henderson, Politz & Williams, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 17.

Walker v. Blacksea S. S. Co., 637 F.2d 287 (5th Cir. 1981)

FACT SUMMARY

Longshoreman slipped and fell down ship's ladder obstructed by lashing wire strung across it as he was attempting to stoop to pass under wire.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: Shipowner 40% negligent and longshoreman 60% negligent.

FIFTH CIRCUIT DECISION

Affirmed.

(Ainsworth, Kunzig and Randall, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

YES

CASE 18.

Guidry v. Continental Oil Co., 640 F.2d 523 (5th Cir. 1981)

FACT SUMMARY

Casing crew pusher employed by Offshore Casing Crews hurt when fellow casing crew employee lifted elevators which swung over & crushed plaintiff's foot between 2,000

pound elevators and rotary table. *Guidry claimed Marlin had congested the floor unnecessarily by placing all the pipe on the floor contrary to normal practice.*

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Directed verdict for defendants well owner (Continental and Mobile drilling platform owner-Marlin) on §905(b) claim. Also imposed $500 sanction against plaintiff's counsel for transportation to rig for discovery photographs and inspection.

FIFTH CIRCUIT DECISION

Affirmed.

"If location of some of the tools afforded some obstacle to a safe performance of the work, the condition was perfectly apparent to all . . ." 640 F.2d 532.

(Brown, Ainsworth, Frank Johnson, Jr., Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

APPENDIX 7

COMPILATION OF POST-SCINDIA FIFTH CIRCUIT DECISIONS IN SECTION 905(b) CASES

CASE 1.

Roberts v. Andrew Martin Sea Services, Inc., 646 F.2d 1064 (5th Cir. 1981)

FACT SUMMARY

None given. Apparently an opinion already rendered was withdrawn after *Scindia* rendered.

TRIAL COURT DECISION: (JURY OR JUDGE)

UNKNOWN

FIFTH CIRCUIT DECISION

Remanded for application of *Scindia*.

(Dyer, Rubin and Politz, Circuit Judges).

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 2.

McCullough v. S. S. Coppename, 648 F.2d 1036 (5th Cir. 1981)

FACT SUMMARY

Longshoreman pulling loaded cart between deck which struck broken board on platform and tipped over, knocking longshoreman off balance causing him to fall through open hatch. Platforms not installed by stevedore.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Summary Judgment for vessel rendered prior to *Scindia.*

FIFTH CIRCUIT DECISION

Reversed and remanded:
"it is for the district court initially to apply [*Scindia*] standard in assessing the propriety of granting summary judgment". 648 F.2d at 1039.

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 3.

Wild v. Lykes Bros. S. S. Corp., 650 F.2d 722 (5th Cir. 1981)

FACT SUMMARY

Ship repairman fell when he slipped from a ladder on the vessel he said was covered with grease. Rungs were tubular shaped piping devoid of non-skid properties.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Summary Judgment for vessel: Applied *Gay* prior to *Scindia*.

FIFTH CIRCUIT DECISION

Reversed and Remanded:
"for reconsideration of the motion for summary judgment . . . in light of *Scindia* and such other recent developments as may be found pertinent."

(Brown, Politz and Tate, Circuit Judges)
(Per Curiam)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 4.

Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981)

FACT SUMMARY

Longshoreman unloading rolls of burlap and bales of jute. He was trying to descend ship's sweat battens to steady unstable stacks of cargo bales, when one of the sweat battens (wooden dividers placed between cargo and hull of ship) broke toppling both Lemon and bales of jute.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Jury: (1) Shipowner negligent in manner of stowing cargo.

(2) Shipowner *not* negligent in providing sweat battens.

Judge: Granted defendant's motions for judgment N. O. V. or in alternative for new trial prior to Scindia, applying restatement standards.

FIFTH CIRCUIT DECISION

Reversed:

(1) Judgment N.O.V. in light of *Scindia: BUT*

(2) Affirmed: grant of new trial limited to question of whether shipowner negligent in stowing cargo. Jury decision in finding no negligence in ship's provision of sweat battens. AFFIRMED.

(Goldberg, Frank M. Johnson and Hatchett, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 5.

Wild v. Lykes Bros. S. S. Corp., 665 F.2d 519 (5th Cir. 1981)

(Summary Calendar)
(Same case as #3 above)

FACT SUMMARY

Same as #3 above.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Same as #3 above.

FIFTH CIRCUIT DECISION

Corrected opinion - result same.

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 6.

Pluyer v. Mitsui O. S. K. Lines, Ltd., 664 F.2d 1234 (5th Cir. 1982)

FACT SUMMARY

Longshoreman using ship's ladder to fasten chains at top of cargo. Ship's ladder had no rubber "snubbers" at bottom to prevent ladder from skidding. As plaintiff descended ladder, it slipped causing him to fall and injure himself. THE CAPTAIN OF THE VESSEL TESTIFIED LADDER WAS UNSAFE.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Ship negligent 60%; plaintiff negligent 40%. New award of $9,895.89. Court applied pre-*Scindia* 5th Circuit standards.

FIFTH CIRCUIT DECISION

Affirmed:"We conclude that *Scindia* did not change the law in this circuit as relates to the situation presented by Pluyer." 664 F.2d at 1247.

(Markey, Chief Judge; Gee and Politz, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

YES

CASE 7.

Cavalier v. T. Smith and Son, Inc., 668 F.2d 861 (5th Cir. 1982) (Summary Calendar)

FACT SUMMARY

Cargo being removed from ship by crane mounted on derrick barge owned and operated by injured longshoreman's employer. Crane operator could not see loads so flagman signaling. Draft of pipes failed to clear hatch coming, causing pipes to slip out of sling and fall into hold on plaintiff.

TRIAL COURT DECISION
(JURY OR JUDGE)

Judge: Held longshoreman's suit barred by Section 905(b) because injury caused by negligence of employees performing stevedore services.

FIFTH CIRCUIT DECISIONS

Affirmed

(Rubin, Johnson, and Garwood).

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 8.

Durr v. Global Marine, Inc., 673 F.2d 740 (5th Cir. 1982)

FACT SUMMARY

Drilling crew member on a fixed platform in Gulf of Mexico assisting in moving equipment from drilling platform to adjoining tender vessel. Crane operator, who was a *seaman*, negligently injured Durr.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Summary Judgment for ship because drilling crew member injured by seaman performing work of a "stevedore" at time of accident.

FIFTH CIRCUIT DECISION

Affirmed

(Coleman, Politz and Garwood, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 9.

Hill v. Texaco, Inc., 674 F.2d 447 (5th Cir. 1982)

FACT SUMMARY

Contractor hired by Texaco to determine effect of rust on thickness of walls of gasoline storage tank. Tank drained of ballast water only 3 hours before plaintiff descended into tank with ultrasonic testing equipment Plaintiff climbing out of tank on "stiffeners" (shelf like projections from tank wall) when a piece of rust came loose and caused his fall.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: Awarded damages to plaintiff, who was found to be guilty of 20% comparative negligence.

FIFTH CIRCUIT DECISION

Reversed:

"Mere presence of the vessel's crew on the ship does not prove knowledge of the hazardous condition." * * * The tank, although wet, posed ONLY A LIMITED AND ACCEPTED HAZARD TO Hill. . ." 674 F.2d at 450, 452.

(Dyer, Sam D. Johnson, Williams, Circuit Judges).

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 10.

Ducote v. International Operating Co. of La., Inc., 678 F.2d 543 (5th Cir. 1982) (Summary Calendar)

FACT SUMMARY

International taking barge owned by Riverway to International's terminal for cleaning. Ducote worked for International. While cleaning cargo pen of barge, Ducote was standing on aluminum ladder unsecured at top and with no rubber feet on bottom. Ladder slipped and he fell. Ducote argued International was owner *pro hac vice* of barge.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: Summary Judgment for International (not owner *pro hac vice* of barge though negligent) and Burnside (not negligent though owner of barge).

FIFTH CIRCUIT DECISION

Affirmed

(Gee, Garza and Tate, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 11.

Burks v. American River Transp. Co., 679 F.2d 69 (5th Cir. 1982)

FACT SUMMARY

Longshoreman unloading barge when fiberglass hatch cover gave way causing plaintiff to fall into hold plaintiff claimed he was entitled to sue for unseaworthiness because he was a member of the crew of a barge which was equipped to transfer cargo from barges to ocean going vessels and 33 USC Sec. 902(3) excludes any "member of a crew of any vessel" from LHWCA benefits *ergo* from coverage under Section 905(b) prohibition against longshoremen's suits for unseaworthiness.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge:

(1) Plaintiff not entitled to sue for unseaworthiness.
(2) No negligence by defendant.

FIFTH CIRCUIT DECISION

Affirmed

Plaintiff did not sue his employer and was not injured on its barge where he was a regular crew member. He was not a member of the crew of barge on which he was hurt, therefore, he could not sue it for unseaworthiness.

(Brown, Wisdom and Randall, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 12.

Chaisson v. Rogers Terminal and Shipping Corporation, 679 F.2d 410 (5th Cir. 1982)

FACT SUMMARY

Longshoreman's employer's elevator barge, that functioned as intermediary between a grain barge and ocean-going vessel to which it had been fastened, causing several tons of grain to be poured upon plaintiff as he worked in the hold. Employers tug had pulled the barge away from the vessel. Defendant claimed injury was caused by negligence of those 'engaged in providing stevedoring services," thus claim barred under Section 905(b).

TRIAL COURT DECISION: (JURY OR JUDGE)

Jury: Shipowner negligent in its vessel operations as distinguished from stevedoring operations. Plaintiff recovers.

FIFTH CIRCUIT DECISION

Affirmed:

"The jury could reasonably find that the negligent failure to provide a stern winch constitutes dereliction of Rogers' duties as a vessel owner."

(Brown, Gee and Garwood, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

YES

CASE 13.

Stass v. American Commercial Lines, Inc., 683 F.2d 120 (5th Cir. 1982)

FACT SUMMARY

Longshoreman trying to open a defective door on deck of cargo barge. Set of doors behind him had been opened. As plaintiff lifted on defective door he could only lift it 3 feet, then had to drop it. Vibration caused him to step back in slippery substance (probably soybean sprout residue), and fall into open hatch behind him.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: Judgment for defendant.

FIFTH CIRCUIT DECISION

Reversed and Remanded:

To apply *Scindia*. "Since it is clear from *Scindia* that a vessel owner is under an obligation to turn its vessel over to the stevedore in a reasonably safe condition and is required to warn the stevedore of any malfunctioning of the vessel's gear or equipment, such as the defective grain door. . . We cannot say with certainty what result the District Court would have reached had it analyzed this case applying the *Scindia* doctrine."

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 14.

Doucet v. Diamond M Drilling Company 683 F.2d 886 (5th Cir. 1982)

FACT SUMMARY

Casing crew pusher injured back while attempting to remove cross threaded pipe thread protector with wrench while one ton joint of casing hanging suspended from sling. Protector should have been removed by drilling company - shipowner's employees on pipe racks. Plaintiff and his co-worker testified the shipowner's driller ignored their request to lift the pipe to a level where the protector might be safely removed with a wrench thus plaintiff had to pull on wrench in a stooped position 2 - 3 feet off floor. The driller testified he remembered nothing about the accident.

TRIAL COURT DECISION: (JURY OR JUDGE)

Jury: Verdict for plaintiff for $600,000 reduced 10% for comparative negligence.

Judge: Denied defendant's motions for directed verdict, Judgment N. O. V., for new trial.

FIFTH CIRCUIT DECISION

Reversed.

(1) "The pipe did not fall on him or strike him. He hurt himself. . ." 683 F.2d at 890.

(2) Reasonable jurors could not infer "that the driller. . . heard the shouted request and simply failed to honor it." 683 F.2d at 894

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

APPENDIX 8

STATISTICAL ANALYSIS OF SECTION 905(b) DECISIONS BY THE FIFTH CIRCUIT

I. *Pre-Scindia*

A.	Total Cases	18
B.	Maritime Worker Finally Denied Recovery	11
C.	Cases Remanded for Trial With Final Result Unknown	4
D.	Trial Court Judgment For Maritime Worker Affirmed	3
E.	Cases Brought to Final Decision	
	1. For Shipowner	78.6%
	2. For Maritime Worker	21.4%

II. *Post-Scindia*

A.	Total Cases	13
B.	Cases Decided Prior to *Scindia* Remanded for Application of *Scindia* With Final Result Unknown	5
C.	Maritime Worker Finally Denied Recovery	6
D.	Affirmed Trial Court Judgment for Maritime Worker	2
E.	Cases Brought to Final Decision	
	1. [illegible]	75%

1. For Shipowner 75%
2. For Maritime Worker 25%

III. Fifth Circuit Decisions Where Maritime Workers Section 905(b) Right to Recovery Finally Decided 22

A. Cases Denying Recovery Against Shipowner 17 (77%)

B. Cases Allowing Maritime Worker's Recovery 5 (23%)